TO: House Judiciary Committee RE: SB 306
From: Kelsen Young, MCADSV Date: 3/8/13

EXHIBIT 9
DATE 3/8/2013
SB 306
RECEIVED

James B. Wheelis
District Judge
512 California Avenue
Libby, MT 59923

MONTANA NINETEENTH JUDICIAL DISTRICT COURT, LINCOLN COUNTY

STATE OF MONTANA, Plaintiff, vs. DALE JAMES MILLER, Defendant.	Cause No. DC 12-63 ORDER GRANTING STATE'S MOTION TO REVERSE JUSTICE COURT'S ORDER OF DISMISSAL

RATIONALE FOR JUSTICE COURT'S ORDER

Robert Salyer, a deputy with the Lincoln County Sheriff's Office, filed an affidavit of probable cause with the Lincoln County Justice Court, Department 2, alleging that on May 12, 2012, Defendant slapped his domestic partner and attempted to choke her. (Affidavit of Probable Cause and Order to Hold or Release, Justice Court Record, D.C. Doc. 1.) He was charged with partner or family member assault, a misdemeanor, under § 45-5-206, MCA. Through counsel, Defendant entered a plea of "not guilty" and requested discovery under § 46-15-322 & -323, MCA. The justice court's omnibus memorandum noted Defendant's intent to assert the affirmative defense of "involuntary action" and to move to dismiss the complaint on equal protection grounds.

Defendant moved to dismiss the complaint on the grounds that the Fourteenth Amendment to the United States Constitution and Article II, section 4 of the 1972 Montana Constitution. He argued that the statute defined "partners" so as to exclude homosexual partners, thus placing heterosexuals at risk of the more burdensome penalties of the PFMA statute, while exposing homosexual partners only to the lesser penalties of misdemeanor assault, § 46-5-201, MCA.

Section 45-5-206(1), MCA, provides:

> A person commits the offense of partner or family member assault if the person: (a) purposely or knowingly causes bodily injury to a partner or family member; (b) negligently causes bodily injury to a partner or family member with a weapon; or (c) purposely or knowingly causes reasonable apprehension of bodily injury in a partner or family member.

Subsections 45-5-206(2)(a) and (b) provide:

> (a) "Family member" means mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These relationships include relationships created by adoption and remarriage, including stepchildren, stepparents, in-laws, and adoptive children and parents. These relationships continue regardless of the ages of the parties and whether the parties reside in the same household.
>
> (b) "Partners" means spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex.

After briefing, the Justice Court granted Defendant's motion to dismiss, noting that the PFMA statute does not apply to homosexuals in a "dating or ongoing intimate relationship, nor those who may have a child in common." Justice Court Opinion, 8-7-2012, D.C. Doc. 1. It found the "two groups," *i.e.*, those in a heterosexual relationship and those in a homosexual relationship, were similarly situated. After discussing the proper test for an equal protection analysis, it decided that the "strict scrutiny" test should be applied, although the State had argued that "rational basis" test should be used. The rational basis test requires a court to determine whether the statute's distinctions are rationally related to a legitimate government interest. Under the strict scrutiny standard, the State has the burden of showing that the statute is narrowly tailored to serve a compelling government interest.

The Justice court said that a PFMA conviction affects the "fundamental right to bear arms" under the Montana constitution and is "stackable," meaning the first and second convictions under the statute serve as predicates to a felony charge for added convictions. The Court said, "There does not appear to be any compelling government interest in having one similarly situated group being deprived of their fundamental rights, while the other group cannot be accountable for the same actions, namely assaulting their 'intimate partner.'" The Court noted that the Legislature had omitted marriage from the definition of "partner," and that the Court did not believe there was any rational basis for the distinction of "opposite sex" in that definition. It said that "while the legislature was trying to preserve its traditional and historical views of opposite sex relationships, it instead created a gross flaw in the statute." The Court relied on the Montana constitution, Article II, section 4.

SUMMARY OF PARTIES' ARGUMENTS

On October 3, 2012, the State moved to reverse the Justice Court's order of dismissal, citing § 46-20-103, MCA, which sets the scope of the State's appeal and includes the dismissal of a case, § 46-20-103(2)(a), and § 46-20-703, MCA, which allows a reviewing court to "reverse, affirm, or modify the judgment or order from which the

appeal is taken." § 46-20-703(1), MCA. It also moved to remand this matter to the Justice Court for further proceedings under § 46-20-706, MCA, D.C. Doc. 4.

The State argues that the Justice Court erred on several grounds in granting Defendant's motion to dismiss. First, a state is not obligated to address every aspect of a problem at once, and it was reasonable for the Legislature to focus on heterosexual relationships because the evidence before it demonstrated that was the bulk of the problem. Second, the State argues that dismissal was not the proper remedy because the arguably impermissible classification could be remedied by striking the phrase "with a person of the opposite sex[]" from § 45-5-206(2)(b).

In response, Defendant argues that the State improperly characterizes his argument as an assertion that same-sex couples are punished less harshly than heterosexual couples who engage in domestic violence. He argues that the statute is unconstitutional because it treats two similarly situated classes of people differently based upon their sexual orientation without either a rational basis or a narrowly tailored provision affecting a compelling state interest. Similarly, Defendant resists the State's second argument, that the offending portion of the statute, namely the phrase that excludes homosexual relationships from the definition of "partners," be severed and the matter remanded to Justice Court for further proceedings. Response, D.C. Doc 5.

MEMORANDUM AND DECISION

I. EQUAL PROTECTION

If certain aspects of this statute could be challenged on clarity, the one at issue here cannot: the statute plainly excludes homosexual partners from its application by explicitly including *only* heterosexual partners. At this point in Montana jurisprudence, homosexuals cannot be married, at least in a manner that the law would recognize the relationship as such. *See* § 40-1-103, MCA. It may well be, as the State argued, that members of a homosexual marriage recognized in another state could be subject to the PFMA statute, but not members of a homosexual relationship whose relationship is not endorsed by such a license.

The State argues that the Legislature is not obligated to solve all aspects of a problem within its compass at the same time. The court agrees. There is no requirement that the Legislature address domestic abuse, however defined, at all. It did not do so in this State until 1985, except as it was included under other assault statutes. But once a state enacts legislation on any topic, it must do so within constitutional boundaries. *See, e.g., Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (citations omitted):

> The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the

> open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

See also, Dandridge v. Williams, 397 U.S. 471, 486-487 (1970) (The Court ruled that the Social Security Act did not require that the aid furnished must equal the total of each individual's standard of need in every family group, but only that some aid was provided to all eligible families and all eligible children, stating, "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.").

The Court has recognized that not all legislatively imposed distinctions are perfect.

> The equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is not an obligation to provide the best governance possible. This is a necessary result of different institutional competences, and its reasons are obvious. Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, this Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems. At the minimum level, this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.

Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (citations omitted) (class of mentally ill persons properly excluded from Medicaid benefits by Congress's decision to incorporate Medicaid standards into SSI program).

The State argues that this court should follow *People v. Silva*, 27 Cal. App. 4th 1160, 33 Cal. Rptr. 2d 181 (1994), *review denied*, Cal. S. Ct., November 17, 1994), which essentially decided the same issue as the case at bar.

> Appellant contends the statute unconstitutionally discriminates against someone like himself who assaults a person (spouse or cohabitant) of the opposite sex because the statute excludes from its scope someone who does the same thing to a person of the same sex. He acknowledges same-sex assailants may be liable under other statutes for assault or battery but argues the discrimination operates nonetheless because punishment for these other offenses is less severe, at least where the injury inflicted is relatively minor.

Silva, 27 Cal. App. 4th at 1166, 33 Cal. Rptr. at 184. The California Appellate Court noted that Silva's equal protection challenge was "based on an alleged sentencing disparity[,]" which it subjected to the rational basis test, which it summarized:

> This test has been described in greater detail as follows: "[T]he constitutional guarantee of equal protection of the laws ... compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.... [T]he Legislature is vested with wide discretion in making the classification and ... its decision as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous.... Only invidious discrimination offends the equal protection clause; ... the Legislature need not treat similar evils identically or legislate as to all phases of a field at once ...; legislative classification is permissible when it is based upon some distinction reasonably justifying differentiation in treatment ...; a classification is not void because it does not embrace within it every other class which might be included .... A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it...."

Silva, 27 Cal. App. 4th at 1168-69, 33 Cal. Rptr. at 186. The *Silva* court outlined the history of California's domestic abuse provisions, noting that earlier abuse of wives by husbands and that of husbands by wives was addressed in separate provisions, as was abuse between unmarried couples. The Court said, "However, the mere omission to deal with domestic violence in same-sex relationships cannot be seen as rendering section 273.5 so irrational or invidiously discriminatory as to warrant judicial interference, and we do not find it to be unconstitutional." *Silva*, 27 Cal. App. 4th at 1171, 33 Cal. Rptr. at 187.

As the *Silva* court noted, the perception and treatment of heterosexual partner abuse has evolved. This is even more the case now, eighteen years after *Silva* was pronounced. As Montana's PFMA statute now stands, the distinctions about how the treatment of abuse varied depending on the gender and relationship of the parties is no longer what the *Silva* court observed. The only distinction this state's statute recognizes is that of same-sex partners. Even abuse by one homosexual from another is punishable under the PFMA statute if it occurs between siblings. Further, the Montana Supreme Court has developed caselaw that negates *Silva* influence as a secondary source, and the court will discuss that below. But the court rejects it as persuasive authority here.

The State also argues that *State v. Renee*, 1999 MT 135, 294 Mont. 527, 983 P.2d 893, supports its motion because the Court there stated that people convicted of different crimes could not appeal to the equal protection doctrine simply because their sentences could vary. Although it is the case that the Defendant here bases his argument at least in part on the disparity in sentencing possibilities between a PFMA defendant and someone accused only under the misdemeanor assault statute, there is a crucial difference between

the situations discussed in *Renee* and here: when we consider partner-based assault, the range of sentencing between the two statutes arises from an accused's sexual orientation, and nothing else. The argument in *Renee* belongs in another universe of discourse.

The State also argues that the evidence before the Legislature has always shown that the prime source of abuse in domestic situations stems from male violence towards female partners. The court does not doubt this. But the PFMA statute is no longer tethered to this evidence for its coverage. It punishes abuse no matter the gender of the abuser, so long as the victim is of the other gender—except as between a parent and a child, or between siblings, or step-siblings, or step-parents and step-children, or adoptive parents and children, in which case the respective genders do not matter at all, and the levels of violence between such people do not matter. It would also be possible for same-sex partners to have a child in common through adoption or conception by one partner, if both were female. *See Kulstad v. Maniaci*, 2009 MT 326, 352 Mont. 513, 220 P.3d 595. Hence we are left with a PFMA statute that applies to same-sex partners only if they are not members of a family, or do not have a child in common in the view of the law, or are not married under the laws of another state, yet the State insists that the governing motivation for the statute remains the incidence of male-female violence. The statute's growing inclusiveness moots this argument.

At hearing, the State argued that focusing exclusively on heterosexual partner abuse simply reflected the evidence before the Legislature during several sessions. This court fails to find that a justification. It seems well-taken that a majority of partner abuse occurs between heterosexual partners, indeed mostly by men abusing women. But that is hardly a reason to *invite* abuse by one homosexual partner towards another, which is the effect of the qualification at issue here. It cannot be presumed that that Legislature, regardless of the feelings of some of its members, would insist on the exclusion of homosexual partners from the coverage of the PFMA statute to *promote* abuse.

On the issue of whether abuse in homosexual relationships occurs with recognizable frequency, a 1995 law review article puts the issue in perspective:

> Because relationships between same-sex couples do not differ in character from those of opposite- sex couples, same-sex couples also experience domestic violence. Research suggests that domestic violence occurs in same-sex relationships with the same statistical frequency as in opposite-sex relationships. While few studies and little research have been done in the area of gay and lesbian domestic violence, estimates conclude that each year between fifty and one hundred thousand lesbians are the victims of abuse and that as many as half a million gay men are battered. Studies also find that the abuse that occurs between same-sex partners has the same elements as abuse in opposite-sex relationships, including dependency, jealousy, and the assertion of control by the abuser over the abused.

Despite similarities which exist between domestic violence occurring in same-sex and opposite-sex relationships, a number of differences compound the severity of domestic violence experienced by same- sex partners. Initially, same-sex partners seeking protection may encounter a police department that is unwilling to take same-sex abuse seriously. When handling same-sex domestic violence cases, police departments and courts, rather than acknowledge or understand that abuse can and does occur between members of the same sex, often believe that a situation of mutual combat is taking place in which the same-sex partners are just fighting. In addition, while all victims of domestic violence experience feelings of isolation and helplessness, abused same-sex partners are even further isolated. Same-sex abusers often use the threat of exposure, or "outing," as a means of repression and control against the victim. Even in the absence of such extortion, victims themselves may be reluctant to seek help because they fear the unpleasant consequences of public revelation of their sexual orientation. Finally, victims of same-sex domestic violence often do not have access to the protective services available to victims of abuse in opposite-sex relationships, since few shelters are dedicated to offering sanctuary to victims of same-sex domestic violence. Although shelters for battered women did not exist in the United States until thirty years ago, by 1994 there were over fifteen hundred shelters or safe homes for victims fleeing the violence of an abusive opposite-sex partner. These shelters, however, routinely deny their services to female same-sex abuse victims, and fewer than ten cities offer any sort of support services for gay men. Thus, internal and external forces combine to push gay and lesbian victims of domestic violence into what has been called "the second closet."

It is important to afford same-sex partners protection from abuse under domestic violence statutes because these statutes provide far more comprehensive legal protection and social services to victims than general criminal assault and battery statutes. For those individuals who qualify, the protection afforded under domestic violence statutes is also far easier to obtain, as thirty-seven states provide some type of ex parte relief for victims upon filing of a complaint of domestic abuse. Further, domestic violence statutes circumvent the ordinary probable cause requirements in order for police to arrest the abuser. Finally, states and municipalities commonly offer victims prosecuting their abusers under domestic violence statutes a network of public services and personal protections, helping to prevent additional abuse effectively without their having to press new charges for each isolated incident of assault or battery. It is, therefore, essential that victims of same-sex domestic violence have access to the full range of protections and services provided to other victims of domestic violence.

Murphy, Nancy E., *Queer Justice: Equal Protection For Victims Of Same-Sex Domestic Violence*, 30 Val. U.L. Rev. 335, 340-44 (1995) (footnotes omitted). *See also* Jablow, Pamela M., *Victims of Abuse and Discrimination: Protecting Battered Homosexuals under Domestic Violence Legislation*, 28 Hofstra L. Rev. 1095 (2000).

The Court has dealt with the issue of same-sex relationships versus heterosexual relationships in another context. In *Snetsinger v. Montana University System*, 2004 MT 390, ¶ 35, 325 Mont. 148, 104 P.3d 445, the Court said:

> Our opinion today reiterates and reaffirms existing common law marriage jurisprudence. We haven't changed anything. We do make clear, however, that any organization that adopts an administrative procedure in order to provide employment benefits to opposite-sex partners who may not be in a legal marital relationship, must do the same for same-sex couples. To not do so violates equal protection.

Snetsinger dealt with the Montana university system's policy prohibiting homosexual employees from receiving insurance coverage for their same-sex domestic partners. The Court recognized that formal marital status itself "play[ed] little if any role in determining who is eligible for benefits[]" because unmarried heterosexual domestic partners could qualify for benefits by submitting an affidavit stating their intent to be married under the common law. *Snetsinger*, ¶ 26. Further, the Court said:

> Because we hold that the University System's policy violates equal protection of the laws under the Montana Constitution by impermissibly treating unmarried same-sex couples differently than unmarried opposite-sex couples, we need not address the Appellants' arguments that the policy violates equal protection by classifying them based on sex or that it violates their rights under Article II, Sections 3 and 10, of the Montana Constitution.

Snetsinger, ¶ 29.

Here, Defendant argued before the Justice Court the PFMA created two similarly situated classes: heterosexual and homosexual partners, in which a homosexual partner committing the same act would be exposed only to the lesser penalties of misdemeanor assault. (The court has been unable to find any other statute under Title 45, chapter 5 (offenses against the person or the family) with gender-based standards.) Defendant cited *Gryczan v. State*, 283 Mont. 433, 457, 942 P.2d 112, 126 (1997), at which point Chief Justice Turnage, concurring in part and dissenting in part, said:

> The Equal Protection Clause prohibits any classification scheme which fails a rational basis analysis. Under rational basis analysis, the Court's inquiry must be whether there exists a legitimate government

> objective which bears some identifiable rational relationship to the classification made.

Gryczan, 283 Mont. at 457, 942 P.2d at 126 (citations omitted). The court notes that in his brief before the Justice Court, the Defendant failed to show that the quoted language was not extracted from the main opinion, but rather Chief Justice Turnage's concurrence and dissent, which argued that the Fourteenth Amendment and Article II, § 4 of the Montana Constitution, not privacy under Article II, § 10 of the Montana Constitution, should have been the grounds for overturning § 45-5-505, MCA, the statute defining deviate sexual conduct that was at issue in that cause.

Defendant further cited Justice James Nelson's concurrence in *Gryczan* for explication of the equal protection doctrine as applied to the deviate sexual conduct statute. The quoted paragraph is useful, except, as before, the language was from Chief Justice Turnage's dissent and concurrence. There was, in fact, no concurrence by Justice Nelson: he wrote the majority opinion. But this is nit-picking. The application of both the federal and the Montana Equal Protection constitutional provisions is clear. As Justice Nelson said in his concurrence in *Snetsinger* (Defendant quoted the concurrence without informing the court that the language was not from the majority opinion), "It is overwhelmingly clear that gays and lesbians have been historically subject to unequal treatment and invidious discrimination." *Snetsinger*, ¶ 45 (Nelson, J., concurring) (citations omitted). More directly pertaining to the case at bar, the concurrence observed:

> And, gays and lesbians are frequently the victims of violence and hate crimes. Federal Bureau of Investigation, Hate Crime Statistics 2000 (November 19, 2001), and 2001 (November 25, 2002). *[Footnote 4]* Indeed, grim testament to this sort of violence and hate occurred in our sister state of Wyoming in October 1998, when Matthew Shephard, a gay college student, was savagely beaten, tied to a fence and left to die.
>
> 4. *See also* Bureau of Justice Statistics, Hate Crimes Reported in NIBRS 1997-99 (Sept. 2001), at http://www.ojp.gov/bjs/pub/pdf/hcrn99.pdf (homosexuals face disproportionate levels of bias-motivated violence and harassment).

The United States Supreme Court has recognized that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence v. Texas*, 539 U.S. 558, 572 (2003), quoting *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), (Kennedy, J., concurring). *Lawrence* held unconstitutional a Texas statute punishing homosexual behavior between two consenting adults.

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve

> public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Lawrence, 539 U.S. at 525-26 (citation omitted).

As the State noted, the situation in *Lawrence* and that presented here are markedly different. *Lawrence* applies, however, on the subject of whether the State has *any* rational ground to omit same-sex relationships from the PFMA's ambit. The situation here is rather the obverse of *Lawrence*. There, the question was whether the state could intrude. Here, the issue is whether the State can decline to protect. *Lawrence* applies because it obviated yet one more ground for the differential treatment of heterosexuals and homosexuals.

II. LEVEL OF SCRUTINY

Although it concludes that the level of scrutiny applied here is essentially irrelevant, the court again quotes *Snetsinger:*

> Appellants argue that the University System's Policy violates their rights to equal protection and dignity provided by Article II, Section 4, by classifying them based on their sex, sexual orientation and marital status and depriving them, without sufficient justification, of the benefits other employees and their families receive as compensation. They also argue the policy violates their right to privacy provided by Article II, Section 10, and the rights to pursue life's basic necessities and to seek safety, health and happiness provided by Article II, Section 3, of the Montana Constitution.
>
> Article II, Section 4, of the Montana Constitution guarantees equal protection of the law to all persons. It provides that "no person shall be denied the equal protection of the laws." "The Fourteenth Amendment to the United States Constitution and Article II, Section 4, of the Montana Constitution embody a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." Article II, Section 4, of the Montana Constitution provides even more individual protection

than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution.

> When analyzing an equal protection challenge, we "must first identify the classes involved and determine whether they are similarly situated." A law or policy that contains an apparently neutral classification may violate equal protection if "in reality [it] constitutes a device designed to impose different burdens on different classes of persons."
>
> Once the relevant classifications have been identified, we next determine the appropriate level of scrutiny. We apply one of three levels of scrutiny when addressing a challenge under the Montana Constitution's Equal Protection Clause: strict scrutiny, middle-tier scrutiny, or the rational basis test. Strict scrutiny applies if a suspect class or fundamental right is affected. Under the strict scrutiny standard, the State has the burden of showing that the law, or in this case the policy, is narrowly tailored to serve a compelling government interest.
>
> We apply middle-tier scrutiny if the law or policy affects a right conferred by the Montana Constitution, but is not found in the Constitution's Declaration of Rights. Under middle-tier scrutiny, the State must demonstrate the law or policy in question is reasonable and the need for the resulting classification outweighs the value of the right to an individual.
>
> The third level of scrutiny is the rational basis test. The rational basis test is appropriate when neither strict scrutiny nor middle-tier scrutiny apply. Under the rational basis test, the law or policy must be rationally related to a legitimate government interest.

Snetsinger, ¶¶ 14-19 (citations omitted).

The United States Supreme Court has commented on the level of scrutiny required for gender-based statutes. (In the court's view, the PFMA definition of "partners" is effectively gender-based.)

> The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." Valuable as VWIL may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade. In sum, Virginia's remedy does not match the constitutional violation; the Commonwealth has shown no "exceedingly persuasive justification" for withholding from women qualified for the experience premier training of the kind VMI affords.

United States v. Virginia, 518 U.S. 515, 555-56 (1996) (citations omitted) (Virginia violated equal protection in denying women admission to a publicly funded university).

> Under our equal protection jurisprudence, gender-based classifications require "an exceedingly persuasive justification" in order to survive constitutional scrutiny.

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 136 (1994) (Fourteenth Amendment prohibits discrimination in jury selection on the basis of gender regardless of whether the challenge involved a male or female).

In the court's view, the level of scrutiny it actually applies is not dispositive. The statute as now written fails the rational basis test, which affords the State far more leeway than examining the statute with strict scrutiny. Given the above, it is not rational for the State to decline coverage of same-sex relationships under the PFMA. The court concludes the PFMA statute falls below both the federal and Montana standards of equal protection of the law. *See, e.g., Oberson v. U.S.D.A.*, 2007 MT 293, ¶ 22, 339 Mont. 519, 171 P.3d 715 (statutory provision violates Mont. Const. art. II, § 4, because overbroad, beyond stated purpose, and fails rational basis test).

The court agrees with the Justice Court's conclusion on the constitutionality of the PFMA statute.

III. SEVERABILITY

The State requests that should this court conclude that the PFMA statute as written is unconstitutional, it consider whether the language can be severed from the body of the statute in a manner that is consistent with the Court's rulings on this topic.

> This Court attempts to construe statutes in a manner that avoids unconstitutional interpretation. If a law contains both constitutional and unconstitutional provisions, the Court first will examine the legislation to determine if there is a severability clause. In the absence of such a clause, the Court considers "whether the integrity of [the law] relies upon the unconstitutional provision or whether the inclusion of [the] provisions acted as inducement to its enactment." If the unconstitutional provisions are stricken, the law must be complete in itself and still capable of execution in accord with legislative intent. Though "the presumption is against the mutilation of a statute," if the offending provisions may be removed without frustrating the purpose or disrupting the integrity of the law, the Court will strike only those provisions of the statute that are unconstitutional.

Western Tradition Partnership v. Bullock, 2011 MT 328, ¶ 51, 363 Mont. 220, 271 P.3d 1, (Baker, J., dissenting), *reversed on other grounds*, __ U.S.__, 132 S. Ct. 2490, 183 L. Ed. 448 (2012) (citations omitted).

The State's motion will be granted in this regard.

As collected in Justice Baker's dissent, the phrase "with a person of the opposite sex" may be pruned from the statute in a manner that fits within the permitted boundaries of judicial amendment through severability. Section 45-5-206, originally entitled "domestic abuse," was enacted at 1985 Mont. Laws ch. 700, § 1. Section 1(b)(2) provided:

> For the purposes of this section and 46-6-401, "family member or household member" means a spouse, former spouse, adult person related by blood or marriage, or adult person of the opposite sex residing with the defendant or who formerly resided with the defendant.

The chapter contained a severability clause at § 7.

The subsection at issue appeared in its current form in 1995 Mont. Laws ch. 350, § 10, adding "persons who have a child in common," with a severability clause at § 31.

Even without a severability clause, the offending words may be excised without transgressing the underlying purpose of the statute, which was to punish and discourage domestic abuse. This court can find no evidence that the Legislature intended this statute as a license or an encouragement for homosexual partners to abuse each other. As noted above, no other assault or homicide statute contains sexual orientation as an element or defense. After all, family members may be homosexual or heterosexual and yet fall within the statute's protection, and perhaps homosexuals married under the laws of another state may be protected. The statute does not treat men or women differently except when they are in a same-sex relationship without children. This court puts the inclusion of the prepositional phrase "of the opposite sex" down to the drafter's cultural inhibitions or squeamishness, although its source is irrelevant. The integrity of § 45-5-206 does not rest on the unconstitutional phrase; its inclusion at any stage of the statute's evolution does not appear to be an inducement to its enactment; with the phrase stricken, the balance of the statute is complete in itself and capable of execution in accord with legislative intent. *See Finke v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576. The objectionable phrase is not a "core provision," but a peripheral qualification. *See Sheehy v. Public Employees Retirement Div.*, 262 Mont. 129, 143-42, 864 P.2d 762, 770 (1993) (striking certain adjustment provisions did not destroy income tax provisions and exemptions). *Cf. In re S.L.M.*, 287 Mont. 23, 40, 951 P.2d 1365, 1375-76 (1997) (statute adding adult sentence to juvenile disposition violates Equal Protection; severability not possible because offending provisions necessary to integrity of act and was inducement to its enactment).

ORDER

The Justice Court's Order of Dismissal is reversed and the matter remanded to that Court, with directions to proceed under § 45-5-206, MCA, as modified by striking from § 45-5-206(2)(b), MCA, the words "with a person of the opposite sex."

Dated this 24th day of October, 2012.

James B. Wheelis
District Judge

pc: Timothy Baldwin, Esq.
Joseph Cik, Esq.
Hon. Stormy Langton, Justice of the Peace
Hon. Jay Sheffield, Justice of the Peace

10-24-12 SR